

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING**

77-1332

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-1332

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

ZVONKO BUSIC, JULIENNE BUSIC,
PETAR MATANIC, FRANE PESUT,
Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of New York

PETITION FOR REHEARING FOR
DEFENDANT-APPELLANT
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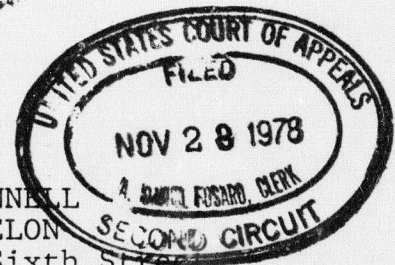


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I. STATEMENT OF FACTS

Julienne Busic and her husband, Zvonko Busic, were convicted of aircraft piracy and conspiracy after a five and one-half week trial in the United States District Court for the Eastern District of New York. On July 21, 1977, they were sentenced to life imprisonment. The appeal of those convictions was argued before this Court on December 8, 1977. On October 30, 1978, the convictions were affirmed.

Five issues were raised by appellants on their appeal to this Court. In a detailed discussion of these issues, comprising some fifty-two pages, this Court ruled on four of the five issues presented. The Court did not rule, however, on an issue of crucial importance to the appeal^{1/} of Julie Busic. This issue, as framed in the questions presented of her opening appeal brief, is:

"Whether Zvonko Busic and Julie Busic were denied a fair trial by the District Judge's caustic attacks on defense counsel and

^{1/}This issue was alluded to only twice in the decision of the Court. In an introductory summary of the issues raised by all appellants, the Court noted that:

"Julienne Busic, Matanic and Pesut all allege that each was denied the right to a fair and impartial trial by the improper remarks and behavior of both the trial court and the prosecution.

"A majority of the court finds that each claim of error is without merit." Slip opinion at 5001.

(footnote continued on next page)

persistent interference with crucial testimony and by the prosecutor's grossly improper argument."^{2/}

Julie Busic's claim of prosecutorial misconduct presented a substantial question for review.^{3/} This critical issue merits close scrutiny and discussion by this Court. The cases originally cited by appellant, as well as new decisions since the initial briefing of this case, demonstrate that the prosecutorial misconduct in this case was egregious and constitutes a compelling independent ground for reversal of her conviction. Appellant Julie Busic respectfully requests this Court to grant her petition for rehearing.

Appellant also respectfully requests that the Court grant leave for oral argument on this matter. Julie Busic has been sentenced to life imprisonment. Moreover, almost an entire year has passed since argument was heard on this appeal. We

(footnote continued from previous page)

The second reference may be found in the opening paragraph of Judge Lumbard's dissent, at page 5025, where he asserted that the court's bias and hostility did not deprive defendant of a fair trial, without reference to the conduct of the prosecutor.

^{2/}The framing of the question mistakenly included Zvonko Busic. From the discussion in the argument section of the opening appeal brief, however, it is clear that only Julie Busic sought reversal on this ground.

^{3/}As pointed out in footnote 1, supra, the issue pertaining to judicial misconduct may have been disposed of by the sweeping reference at page 5025 of the opinion. However, if the Court did not intend to dismiss the arguments contained at pages 51 through 57 of Julie Busic's opening brief, we respectfully request that this petition for rehearing also be granted on the issue of judicial misconduct.

further believe that argument on this significant issue would be helpful to the Court.

II. ARGUMENT

A. The Court Failed To Address A Critical Issue Of Appellant's Appeal

1. A Substantial Part of the Briefing By Appellant and the Government Was Devoted To this Issue

Three briefs were filed with this Court in connection with the appeal of Zvonko and Julie Busic from their convictions. In the initial brief for these appellants, five issues were raised, including the issue of prosecutorial misconduct. Of the forty-nine pages of argument in that brief, twelve pages, or almost 25 percent, were devoted to the issue of judicial and prosecutorial misconduct. Of these pages, one-half concerned the prejudicial errors and affirmative misrepresentations made by the prosecutor. In addition, Appendix D of the initial brief set forth eight pages of improper summation by the Assistant United States Attorney.

The government's brief dealt with all issues raised by both the Busics and their two other co-defendants. Nine percent of the government's brief was devoted

to the issue of prosecutorial misconduct. In the course of that argument, the United States Attorney admitted the impropriety of one of the actions of the prosecutor.^{4/} The government, however, did not admit the error of the prosecutor in mischaracterizing the evidence during his summation.

Indeed, the United States Attorney himself mischaracterized the record in the appellee's brief in an attempt to disguise the severe prejudice to the appellant caused by the prosecutor's misconduct. The distortion of the facts in the government's brief was sufficient to cause counsel for the Busics to devote 19 out of the 50 pages of the reply brief, a full 38%, to clarification of the record with respect to this issue.

^{4/}The government's brief, at pages 66-68, discusses the prosecutor's use in summation of Zvonko Basic's hearsay statement regarding Julie's knowledge of the "dangerous package." Citing what would arguably have been a proper use of that statement, the government asserted that the actual use of different language should not be considered an error of sufficient magnitude to concern the Court.

In fact, however, the language actually used by the prosecutor went far beyond a statement merely casting doubt on Zvonko's credibility as a witness. Rather, the prosecutor, improperly in direct violation of two rulings by the trial court, used the statement to impute specific knowledge to Julie:

"And I might add just for the sake of completeness, with respect to Mrs. Basic, Mrs. Basic, according to what Mr. Basic told Agent Strand, knew that there was a dangerous substance in her apartment, and I suggest to you, ladies and gentlemen, that you saw Mrs. Basic and I ask you how far do you think someone would get, someone like her husband, if he tried to keep dynamite in her apartment for three months, part of the time in her closet without her knowing it?" [T. 544] (emphasis added).]

2. The Court Recognized the Importance
Of the Misconduct Issue With Respect
To Other Appellants

The dissent by Judge Lumbard confirms the importance of the issue of prosecutorial misconduct in this trial. The dissent focused only on the effect of continuous interruptions by the trial judge and the prosecutor of summation by counsel for two of the co-defendants. Nevertheless, Judge Lumbard's reasoning applies with equal force to the substantial fair trial issue raised by Julie Busic.

One aspect of Judge Lumbard's discussion is especially revealing of the significance of the question raised by Julie Busic which the Court did not address. Judge Lumbard observes that after

"the jury had heard nearly 50 witnesses during 21 trial days, extending from March 23 to April 28, 1977, it remained for counsel to summarize the case before the jury, to assess the evidence in terms of the charges, and to argue the weight to be given the evidence and sufficiency of the proofs. The jury could perform its function only with the help of counsel for both sides, particularly in light of the court's decision (previously disclosed to counsel) not to marshal the evidence." Slip opinion at 5033.

This statement recognizes the obvious influence of counsel in closing argument. The jury takes into the jury room the summation--the final gloss on testimony already dimmed in their memories by the passage of time and subsequent events. Judge

Lumhard's characterization of government counsel's conduct-- which was not challenged by the majority--suggests the magnitude of the effect of the improper summation:

"The government's case was stated at great length and in detail for over five hours during the early hours of the court day when the jury was fresh. Although government counsel spared no language in condemning the actions of the defendants, and drew numerous inferences, some of which the court later found to be unsupported, the five and a half hour harangue was uninterrupted." Slip opinion at 5030 (emphasis added).

In this case the prosecution abused its trust and position in the summation by misrepresenting the record, arguing improper evidence, and making emotional and highly prejudicial claims about the veracity of Julie Busic and the nature of her defense. In view of the importance of the summation to the fairness of the trial, such manifest abuse should not go without notice.

B. Applicable Law Mandates The Grant Of A
New Trial On The Basis Of The
Prosecutorial Misconduct

1. The Arguments of Appellant in the
First Instance Support Reversal

In Julie Busic's opening and reply briefs, the arguments with respect to prosecutorial misconduct were set forth in detail. We respectfully direct the attention of the

Court to the text of those arguments, which are reproduced as Appendix A and Appendix B hereto for the convenience of the Court. These arguments are briefly reviewed below.

The first category of prosecutorial misconduct was the repeated use, in summation, of the hearsay statement of Zvonko Basic pertaining to Julie's knowledge of the "dangerous package" as evidence against Julie and the other defendants. This statement, which had been contradicted in direct testimony, was used with devastating effect to discredit and undermine Julie Basic's defense, and to impute to her knowledge of the bomb before the hijacking. This argument flatly violated limiting instructions given long before summation by the trial judge. Under controlling Second Circuit authority, such use of evidence subject to a limiting instruction is clearly prejudicial and mandates reversal of the conviction. See White v. United States, 294 F.2d 952 (9th Cir. 1961); see also United States v. Torres, 503 F.2d 1120 (2d Cir. 1974).^{5/}

The other category of prejudicial and improper statements by the prosecutor consisted of the persistent accusations that Julie Basic's entire defense was either non-existent or fabricated, and that both she and Zvonko Basic

^{5/} Judge Lumbard noted the prosecutor's "use of Mr. Basic's post-arrest statement to incriminate the other defendants, a clear violation of the hearsay principle of Bruton v. United States, 391 U.S. 123 (1968)." Slip opinion at 5026 n.13.

were lying.^{6/} To drive home his points, the prosecutor repeatedly insulted Julie Busic, and deliberately misrepresented the record to the jury.^{6/}

Faced with clear statements by the Second Circuit that such conduct is improper and prejudicial, the government made a perfunctory and unsuccessful attempt in its brief to distinguish the cases cited by appellants. (United States v. White, 486 F.2d 204 (2d Cir. 1973), cert. denied, 415 U.S. 980 (1974); United States v. Bivona, 487 F.2d 443 (2d Cir. 1973).)^{7/} Even a casual examination of appellee's brief is revealing. The government did not even bother to discuss Bivona, the controlling precedent in this Circuit. In discussing White, the government observed that Julie Busic's trial, unlike the White trial, was long. The government concluded by suggesting that this case, like the White case, involved "clear and convincing" proof of guilt. Both of these distinctions are transparent.

First, the length of trial is not a controlling consideration under the White decision. Indeed, the necessity for fair and objective summations after a lengthy trial is even more imperative. As Judge Lumbard noted:

^{6/}The extent of the prosecutor's misrepresentation and mischaracterization was such that Judge Bartels was forced to rule explicitly that two of the statements made during the summation were improper and unsupported by the evidence. (T. 5480, 5481)

^{7/}White and Bivona held that it is reversible error for a prosecutor to assert that the defense is fabricated or to accuse the defendant of lying.

"At the end of a long trial the jury will have forgotten much of the evidence, it can have in mind only bits and pieces of the evidence, much of it unconnected and of uncertain relevance to the opposing contentions of the government and the defense." Slip opinion at 5030.

Second, the evidence of Julie Busic's guilt was not as overwhelming as the government suggests. Julie Busic's reply brief went to great lengths to clarify the record on this score. See Appellants' Reply Brief at 2-16. She defended the charges on the basis of her status as merely a knowing spectator and her lack of the requisite intent to plan or participate in the hijacking. In light of this defense, any unsubstantiated argument that Julie had previous knowledge about her husband's activities or that she was lying was highly damaging.

2. Decisions Since the Argument of
This Case Further Support Julie
Busic's Position

Recent decisions by other federal courts strongly support the arguments advanced on behalf of Julie Busic. Two courts have set aside convictions for similar prosecutorial misconduct in closing argument. These cases provide additional grounds for this Court to reconsider its affirmance of Julie Busic's conviction.

In United States v. Narciso, 446 F.Supp. 252 (E.D.Mich 1977), the court granted a motion for new trial largely because of prosecutorial misconduct during trial.

Narciso involved misbehavior by government counsel strikingly similar to the misconduct in Julie Busic's case. The court identified a series of the prosecutor's acts, including his failure to obey the rulings of the court during critical parts of the trial and his closing argument that defendant had failed to present a defense. 446 F.Supp. at 321, 322. In so doing, the prosecutor made improper statements about the crucial issue, which, in that case as in this one, was the defendant's credibility.

Narciso suggests that the reviewing court must undertake a comprehensive review of the entire record to determine the effect of prosecutorial misconduct on the defendant. The new trial was mandated there because

"the overwhelming prejudice to the defendants arising from the government's persistent misconduct prevented the jurors from receiving the case free from taint. Error need not be dramatic or immediately obvious to require a new trial in a criminal case. The insidious accretion of prosecutorial misconduct in this case 'polluted the waters of justice,' . . . as surely as if the prosecutor had argued that the jurors should ignore the dictates of the Constitution." 446 F.Supp. at 328 (citation omitted; emphasis added).

During Julie Busic's trial, the prosecutor similarly "polluted the waters of justice" by the improper use of inadmissible hearsay as evidence and grossly prejudicial arguments relating to the credibility of Julie and her defense. Rehearing of this matter would allow this Court to consider these egregious errors in light of established Second Circuit precedent and the thoughtful teaching of Narciso.

Reconsideration is further warranted in view of United States v. Corona, 551 F.2d 1386 (5th Cir. 1977). There the Fifth Circuit reversed because it found that the prosecutor had

"lost sight of his responsibility to insure that the defendant be afforded a fair hearing based only on the evidence properly presented to the jury at trial." 551 F.2d at 1388.

The Fifth Circuit found that the prosecutor's suggestions to the jury and improper manner of argument went beyond the bounds of permissible argument. The Court cited the heavy duty of the prosecutor to seek justice rather than victory. The Court also referred with approval to the American Bar Association standards^{8/} and the clear command of the United

^{8/}Appellant's opening and reply briefs demonstrated that the prosecutor in this case violated all four prohibitions of section 5.8 of The American Bar Association Standards Relating to the Administration of Criminal Justice: The Prosecution Function:

"(a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.

"(b) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.

"(c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.

"(d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict."

States Supreme Court in Berger v. United States, 295 U.S. 78 (1935).^{9/} Julie Busic's right to a fair trial demands the same careful consideration of impropriety and overzealousness by the prosecution.

^{9/}The * often-quoted language of Berger seems to have been written with Julie Busic in mind. The conduct criticized by the Supreme Court is an accurate portrayal of the prosecutor's conduct at her trial:

"The prosecuting attorney's argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury."

* * * *

"It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations [to do justice], which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

* * * *

"Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded. Compare New York C. R. Co. v. Johnson, 279 U.S. 310, 316-318." 295 U.S. at 85, 88-89.

III. CONCLUSION

For the reasons discussed above, appellant Julie Busic respectfully requests this Court to grant her petition for rehearing and to schedule oral argument.

Respectfully submitted,

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A P P E N D I X

case were major ones. The guilt or innocence of Julie Basic rested almost entirely upon the jury's evaluation of her credibility and the force of her testimony. However, by his prosecutorial attacks on her credibility, his interference with vital testimony, and his condemnation of defense counsel, the trial judge signaled the jury what verdict to return.

This judicial conduct is totally unacceptable. "The influence of the trial judge on the jury is necessarily and properly of great weight and his lightest word of intimation is received with deference and may prove controlling." United States v. Grunberger, 431 F.2d 1062, 1068 (2d Cir. 1970), quoting Quercia v. United States, 289 U.S. 466 (1933). Julie Basic was entitled to a fair trial presided over by an impartial judge. Since she did not receive one, her conviction must be reversed.

B. Julie was Denied a Fair Trial by the Prosecutor's Improper Use in Closing Argument of Inadmissible Evidence and References to a Fabricated Defense

In Appendix D to this brief, we have set forth excerpts from the prosecutor's closing argument. These statements were much more than hard-hitting. They were foul blows and unworthy of a government representative. See, Berger v. United States, 295 U.S. 78, 88 (1935).

1. The Prosecutor Violated Limiting Instructions and Argued From Inadmissible Evidence

The government's case against Julie relied heavily on an alleged statement by Zvonko that he had told Julie that a

package stored in their closet was "dangerous." (T. 4559'. Zvonko denied having told Julie about a dangerous package and denied having made such a statement. (T. 3151). Thus, the only evidence that Zvonko told his wife about a dangerous package was an out-of-court statement made after the conspiracy ended. The Judge properly gave the jury two limiting instructions to the effect that Zvonko's out-of-court statement was admissible only against Zvonko and no one else. (T. 4561, 4564).

In his overwhelming zeal to secure a conviction, the prosecutor could not be bothered with such "technicalities" as limiting instructions. He used this evidence, inadmissible against Julie, three times in summation. (T. 5377-5377a, T. 5392, 5441-5442). And two of these times it was directed only at Julie.^{34/}

"And I might add just for the sake of completeness, with respect to Mrs. Busic, Mrs. Busic, according to what Mr. Busic told Agent Strand, knew that there was a dangerous substance in her apartment and I suggest to you, ladies and gentlemen, that you saw Mrs. Busic and I ask : ou how far do you think someone would get, someone like her husband, if he tried to keep dynamite in her apartment for three months, part of the time in her closet without her knowing it? And further than that, how likely do you think it is that when Mr. Busic told Mrs. Busic 'Now, look Julianne, don't touch

^{34/} The prosecutor repeatedly used Zvonko's statement against all the defendants. The trial judge was forced to give another limiting instruction about one such instance, but he did not refer to Julie. (T. 5573-5574).

that because it is dangerous.'

"Is that all Mr. Basic told her? That is all he admitted to telling her to the F.B.I. Do you think that Mrs. Basic was in doubt as to what her husband was storing in the apartment?" (T. 5441-5442; emphasis added).

The most important part of Julie's defense was her testimony that she did not believe her husband would commit a violent act and that she had no idea he was constructing a bomb. It was this critical testimony that the prosecutor undermined with repeated references to inadmissible hearsay statements which, in fact, had been derived by direct testimony.

In White v. United States, 294 F.2d 952 (9th Cir. 1961), the Ninth Circuit held that it was prejudicial error for a prosecutor to violate a limiting instruction during his summation. In circumstances almost identical to those here, the court reversed the conviction. More recently, this Court reversed a conviction because the prosecutor's summation implied that impeachment testimony was affirmative evidence. United States v. Torres, 503 F.2d 1120, 1126 (2d Cir. 1974). The misconduct in this case is even more egregious since the inadmissible testimony was not even given by the person against whom it was used. On the basis of this grossly improper argument alone, Julie's conviction must be reversed.

2. The Prosecutor's Outrageous References to
A Fabricated Defense Require Reversal

In United States v. White, 486 F.2d 204 (2d Cir. 1973), cert. denied, 415 U.S. 980 (1974), this Court held that it is improper for a prosecutor to accuse the defense with being fabricated or the defendant of lying. See also United States v. Bivona, 487 F.2d 443 (2d Cir. 1973). In this case the government prosecutor committed both errors time and time again. The only appropriate sanction is reversal.

After making the improper and erroneous comment that Zvonko "admitted before you under oath on the witness stand his guilt 100 per cent" (T. 5341), the prosecutor sought to explain to the jury Zvonko's motive for testifying:

"He testified because he wanted to exculpate his co-defendants.

* * *

"He's got to come up with something that is going to sound as plausible as he can" (T. 5345, 5347).

When Zvonko contradicted the testimony of an agent regarding post-arrest questioning, the prosecutor told the jury that the defendant's testimony was "simply untrue," and he attempted to bolster the agent's testimony. (Appendix D of Appellant's Brief at 2) (hereinafter "App. D"). Again, and again, and again, the prosecutor accused the defendants of lying. (See, e.g., App. D 1). In one of his typical flights of rhetoric, he stated:

"I suggest to you that you couldn't tell that story to a three year old and have that little baby believe it. Why did Mr. Busic tell that nonsensical story?" (App. D 1-2).

The prosecutor simply could not confine himself to pointing out what he believed were inconsistencies in defense testimony. His improper conduct severely prejudiced Julie since her most crucial testimony was corroborated by Zvonko. He accused Zvonko of telling "nonsensical" lies and of doing so to protect Julie.

"Now, try as he might to exculpate the co-defendants, I suggest to you that nevertheless, as to his wife, the evidence was too difficult for even Mr. Busic's agile mind to overcome."

* * *

"He said it because he was trying to help, to the best [o]f this ability, his wife Julianne."
(App. D 3-4). 35/

This is grossly improper argument.

Nor was the prosecutor content to level his barrage of prejudicial remarks solely against Zvonko. He was compelled to tell the jury:

35/ Not content to argue that Zvonko lied to exculpate Julie, the prosecutor also told the jury that "as a matter of law," Zvonko "came very, very close, if he in fact did not implicate" Julie in the hijacking. (App. D 3). With this statement, he literally took Julie's case away from the jury. The judge ruled that this remark was improper (T. 5463) but never gave a curative instruction to the jury.

"Mrs. Basic remember what she wants to remember . . . when with regard to things that aren't going to help her no matter whatever she knows about them or not, she tells you she doesn't remember." (App. D 5).

The prosecutor kept up his torrent of abuse, charging Julie of being "manipulative" (App. D 6); of playing "cute" (App. D 8); of refusing to make admissions (App. D 5-7); of giving "nonsensical" and "ridiculous" explanations (App. 5-7); and of trying to "score a point with the jury" (App. D 6). To make sure the jury had not missed his point, he drove it home one more time:

"And now after it's all over, in line with the nonsensical and unintelligent, insulting defense that has been presented in this case, now she says, oh, I did it because I was pregnant." (App. D 7) (emphasis added.) 36/

This disgraceful conduct is unbecoming a representative of the United States government and is far worse than that which has already been condemned by this Court in Bivona and White.^{37/}

Julie's conviction must be reversed.

36/ To cover all bases, the prosecutor not only accused Julie of presenting a stupid defense (T. 5481), but also charged her with not putting on any defense. "Mrs. Basic, I suggest to you, testified but did not offer a defense. She simply did not offer a defense." (App. D 4).

37/ The prosecutor's conduct should also be scrutinized. in light of his misrepresentations of the record. He took extreme liberties with the record to argue that Julie considered good morale to be essential to the hijacking (T. 5313); Julie was the most trusted member of the hijacking team (T. 5337); and Julie "introduced" the hijackers to the crew (T. 5297). The last remark was so unsubstantiated that it prompted the trial judge to sustain an objection. (T. 5480).

Julie could have been acquitted of aircraft piracy, but convicted of interference with a flight crew. She was therefore entitled to a lesser included offense instruction. The failure to give this critical charge requires reversal.

V.

THE APPELLANTS PROPERLY OBJECTED TO PREJUDICIAL
REMARKS IN THE PROSECUTOR'S CLOSING ARGUMENT

The government has set forth in twenty pages its response to the argument that Julie was denied a fair trial by egregious judicial and prosecutorial misconduct. We are content to rest upon the arguments made in our opening brief and this Court's review of the record. Nevertheless, we are obliged to respond to two serious misstatements by the government concerning whether the appellants properly objected to prejudicial remarks in the prosecutor's closing argument.

The government opens its defense of the prosecutor's closing argument with the following statement:

"Although page after page of improper comments are now alleged by Mrs. Basic, the summation was not interrupted once by an objection. This was not because there was agreement by 'all sides' that there would be no objections during summations, as the Pesut-Matanic brief (p. 42) suggests (Tr. 5252-5254), but because they chose to sit by and say nothing in the hope that the prosecutor would say something that would taint the conviction that was inevitable." (Gov. Br. 65) (footnote omitted).

This contention is absolutely untrue, and the government knows it.

Prior to the commencement of closing arguments, Judge Bartels and all counsel huddled at the bench to discuss the Procedure for making objections during closing argument. (T. 5251-54). Zvonko's counsel stated that it was

"my practice when I have an objection to remark in summation by my opponent, unless it is really something that goes beyond the beyond, I try to save it until he's finished." (T. 5253) (emphasis added). 20/

Zvonko's counsel reiterated that counsel would "[w]ait until he finishes and then let the Court rule on it." (T. 5254). Judge Bartels approved the agreement with the observation "[t]hat is a far better way."^{21/} Any possible doubt about the agreement is dispelled by counsel's reiteration of the original understanding during a break in the prosecutor's closing argument. (T. 5401).

20/ In its brief the government cites only half of Mr. Tigar's statement ("goes beyond the beyond") and neglects to point out that in the same sentence Mr. Tigar made it abundantly clear that there was an agreement not to make objections during summations. See Gov. Br. 65 n.42.

21/ When the prosecution violated this agreement by interrupting the closing argument of Pesut's counsel, Judge Bartels admonished the prosecutor and told him to abide by the original agreement.

"The defendants restrained themselves until Mr. Schlam was finished. So I will ask Mr. Schlam to refrain [sic] himself until the defendants are finished and then he can make his objections after they are finished, or after Mr. Rochman is finished All right. Now, Mr. Schlam, therefore, you wait." (T. 5495).

The government also charges that, as for the challenged statements by the prosecutor, "most" of them were never the subject of an objection. (Gov. Br. 66). This is simply false. As the following list of examples indicates, Julie's trial counsel objected to a host of the prosecutor's closing remarks.^{22/}

These included:

(1) Julie introduced the flight steward to the hijackers.^{23/} (T. 5457).

(2) Julie admitted that she knew about the bomb. (T. 5458).

(3) The prosecutor's violation of the judge's limiting instructions concerning Zvonko's alleged statement to the FBI agent about Julie's knowledge of explosives and the bomb. (T. 5459-61).

(4) Zvonko implicated Julie as a matter of law. (T. 5462).

(5) Julie did not offer a defense. (T. 5463).

^{22/} The trial court indicated that the objections noted by counsel would be deemed to have been adopted by all defense counsel. Moreover, the objections of Zvonko's counsel were noted prior to those of Julie's. (T. 5449-56).

^{23/} This exaggeration was so improper that Judge Bartels instructed the jury that the evidence did not support this statement. (T. 5480).

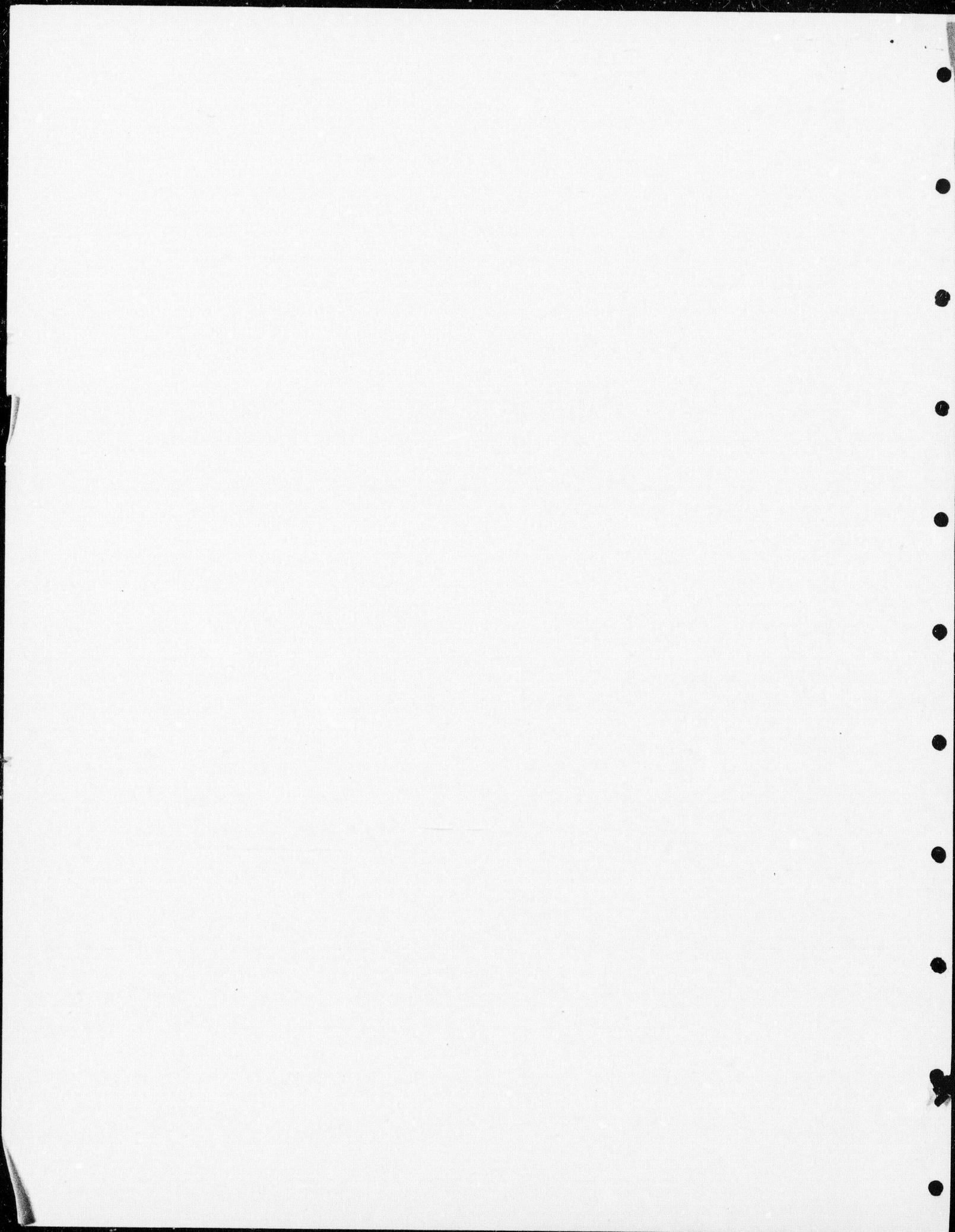
(6) Julie Busic thinks the jury is stupid.
24/
(T. 5464).

We acknowledge that a few of the prosecutor's prejudicial comments went undetected at trial. These include his charges that Julie was "manipulative", "playing cute", refused to make admissions, gave "nonsensical" and "ridiculous" explanations, and tried to "score a point with the jury". (Apps. Br. 62). Trial counsel's failure to object is not significant and is understandable. First, these types of arguments are similar to those categories listed above to which counsel objected. Second, the prosecutor's closing argument consumed five and one-half hours and runs for approximately 160 transcript pages. It is therefore not surprising that a few remarks would be lost in the shuffle. Finally, the trial judge was obviously anxious to proceed with defense counsel's summations, and he did not allow defense counsel an opportunity to review the transcript or to take an adequate recess to formulate objections.

CONCLUSION

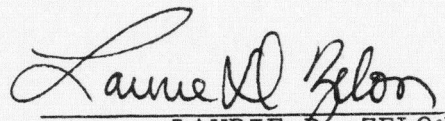
For the reasons stated in the appellants' opening brief and this reply brief, we respectfully request that the convictions

24/ Judge Bartels instructed the jury that the prosecutor's argument that Julie's defenses were "an insult to your intelligence" was improper. (T. 5481).



CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Rehearing, Notice of Motion for Admission Pro Hac Vice, Notice of Motion for Permission to File Appendix, and supporting Affidavits of Pierce O'Donnell were mailed first class, postage prepaid, this 12nd day of November, 1978, to Edward R. Korman, Esq., United States Attorney, Eastern District of New York, Federal Building, 225 Cadman Plaza East, Brooklyn, New York 11201, and to Paul B. Bergman, Esq., Ford, Marrin, Esposito, Witneyer & Bergman, 120 Wall Street, New York, New York 10005.


LAURIE D. ZELON